# Suraya bt Amdah v Ketua Setiausaha Kementerian Kesihatan Malaysia & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–40–07 OF 2013
COLLIN SEQUERAH JC
10 JULY 2015

*Administrative Law — Judicial review — Certiorari — Application for — Applicant secured nursing college for three years but terminated months before conclusion of training — Whether applicant 'public servant' — Allegation of sexual misconduct — Decision of Disciplinary Committee and Appeal Committee — Whether there was procedural impropriety — Whether there was breach of natural justice — Whether there was biasness — Federal Constitution s 135(2)*

The applicant successfully secured a scholarship for a nursing diploma course for three years. A few months before the concluding her training period, the applicant received a letter from the Chairman of the Jawatankuasa Tatakelakuan Pelatih from the Bahagian Pengurusan Latihan, Ministry of Health, informing her that she was suspended from the course and that her scholarship payments were ceased from 19 October 2012 until a decision was made by the said committee. The applicant had allegedly engaged in sexual relations with a man outside marriage. The applicant received a letter informing her that the disciplinary committee had made a decision to terminate her from the course and she had to pay a fine of RM110,000. The applicant's appeal to the second respondent ('the appeal committee') was unsuccessful and the decision of the earlier committee was affirmed. Hence, the present application for judicial review to quash the decision of the appeal committee. The issues that arose for the court's determination were whether there was any procedural impropriety; whether the presence of one Ong Lee Hwa ('Ong'), who received the college report, was to merely perform secretarial duties or to participate in a decision making capacity; and whether there was any danger of bias by reason of Ong's presence at the said meetings.

**Held,** dismissing the application with costs:

(1) The applicant did not come within the definition of 'public servant', therefore, she could not claim the protection under art 135(2) of the Federal Constitution ('the Constitution'). Analogous to the position of public servants under the general orders, there was no right to an oral hearing unless one had made a request for such hearing. A similar position was obtained with regards to the disclosure of both the CD and

the college report. As there was no request made by the applicant for those materials, it could not be said that she was denied natural justice (see paras 34–35).

(2) The letter dated 23 October 2012 informed the applicant that she was given an opportunity to defend herself in writing within a period of 21 days from the receipt of a show cause letter. Although the applicant did not fall within the definition of a public servant under art 135(2) of the Constitution, the requirements of natural justice were nonetheless satisfied by the opportunity given to her to make written representations which were expressly contained in the Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan Bersekutu Kementerian Kesihatan Malaysia 2010 ('the regulations'). The ground of application advanced by the applicant, namely that of a breach of natural justice and procedural unfairness for not supplying documentation had failed (see paras 34 & 37).

(3) The composition of the disciplinary committee and the appeals committee was one that was determined by the regulations. The presence of Ong was also one that was determined by the regulations and her presence was necessary in order to constitute the quorum of the said committees. The principle of necessity excluded bias and an adjudicator who may otherwise be disqualified from adjudicating on a dispute because of bias, may still have to adjudicate on the matter because there may be no one else left that was competent to decide the matter, or if a quorum could not be formed without him or her. The exception was based on practical necessity (see para 59).

(4) There was no real danger of bias by reason of Ong's presence at the meeting of the disciplinary committee and also the appeals committee. The role performed by Ong was secretarial and administrative in nature. There was no evidence advanced that Ong had brought to bear any undue influence in the decision made by the appeals committee given her limited role. Mere supposition or conjecture was insufficient to make out a case of bias. There was no merit in the allegation of bias raised by the applicant (see para 64).

**[Bahasa Malaysia summary**

Pemohon berjaya mendapatkan biasiswa untuk kursus diploma jururawat untuk tempoh tiga tahun. Beberapa bulan sebelum selesai tempoh kursus, pemohon menerima surat daripada Pengerusi Jawatankuasa Tatakelakuan Pelatih dari Bahagian Pengurusan Latihan, Kementerian Kesihatan, memaklumkannya yang dia digantung daripada kursus dan bahawa bayaran biasiswanya ditamatkan dari 19 Oktober 2012 sehingga keputusan dibuat oleh ahli jawatankuasa tersebut. Pemohon telah didakwa terlibat dalam hubungan seksual dengan seorang lelaki di luar perkahwinan. Pemohon menerima surat

yang memaklumkannya bahawa jawatankuasa tatatertib telah membuat keputusan untuk menamatkan dia daripada kursus tersebut dan dia kena membayar denda sebanyak RM110,000. Rayuan pemohon kepada responden kedua ('jawatankuasa rayuan') tidak berjaya dan keputusan jawatankuasa sebelumnya disahkan. Maka, permohonan ini untuk semakan kehakiman untuk membatalkan keputusan jawatankuasa rayuan. Isu yang berbangkit untuk penentuan mahkamah adalah sama ada terdapat apa-apa prosedur yang tidak betul; sama ada kehadiran seorang yang bernama Ong Lee Hwa ('Ong'), yang menerima laporan kolej, hanya untuk memberitahu tugas-tugas setiausaha atau untuk menyertai dalam kapasiti membuat keputusan; dan sama ada terdapat apa-apa bahaya berat sebelah atas alasan kehadiran Ong di mesyuarat tersebut.

**Diputuskan,** menolak permohonan dengan kos:

(1) Pemohon tidak termasuk dalam maksud 'public servant', oleh itu, dia tidak dapat menuntut perlindungan di bawah perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan'). Kedudukan seakan-akan penjawat awam di bawah perintah am, tidak berhak kepada pendengaran lisan kecuali seseorang telah membuat permintaan untuk pendengaran sedemikian. Kedudukan yang sama diperolehi berkaitan pendedahan kedua-dua cakera padat dan laporan kolej. Memandangkan tidak terdapat permintaan yang dibuat oleh pemohon untuk material tersebut, ia tidak dapat dikatakan yang dia dinafikan keadilan semulajadi (lihat perenggan 34–35).

(2) Surat bertarikh 23 Oktober 2012 memberitahu pemohon bahawa dia diberi peluang untuk membela dirinya dalam menulis dalam tempoh 21 hari dari penerimaan surat tunjuk sebab. Walaupun pemohon tidak termasuk dalam maksud penjawat awam di bawah perkara 135(2) Perlembagaan, kehendak keadilan semulajadi walau bagaimanapun dipenuhi dengan memberikan peluang kepadanya untuk membuat representasi bertulis yang mana secara nyata terdapat di dalam Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan Bersekutu Kementerian Kesihatan Malaysia 2010 ('peraturan'). Alasan permohonan yang dikemukakan oleh pemohon, iaitu bahawa kemungkiran keadilan semulajadi dan prosedur yang tidak betul kerana tidak memberikan dokumen telah gagal (lihat perenggan 34 & 37).

(3) Penyusunan jawatankuasa tatatertib dan jawatankuasa rayuan adalah satu yang ditentukan oleh peraturan. Kehadiran Ong juga adalah satu yang ditentukan oleh peraturan dan kehadirannya adalah perlu untuk membentuk korum jawatankuasa tersebut. Prinsip keperluan mengecualikan berat sebelah dan pengadil yang mungkin sebaliknya tidak layak daripada mengadili ke atas pertikaian kerana berat sebelah, tetapi masih perlu mengadili ke atas perkara tersebut kerana mungkin

tiada orang lain yang layak untuk memutuskan perkara tersebut, atau jika korum tidak dapat dibentuk tanpanya. Pengecualian adalah berdasarkan keperluan praktikal (lihat perenggan 59).

(4) Tidak terdapat bahaya berat sebelah atas sebab kehadiran Ong di mesyuarat jawatankuasa tatatertib dan juga jawatankuasa rayuan. Peranan yang dijalankan oleh Ong adalah bersifat kesetiausahaan dan pentadbiran. Tidak terdapat keterangan yang dikemukakan bahawa Ong telah dibawa untuk menanggung apa-apa pengaruh tak wajar dalam keputusan yang dibuat oleh jawatankuasa rayuan dengan peranan terhadnya. Semata-mata angggapan atau tekaan adalah tidak mencukupi untuk membuat kes berat sebelah. Tidak terdapat merit dalam dakwaan berat sebelah yang dibangkitkan oleh pemohon (lihat perenggan 64).]

**Notes**

For cases on certiorari, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 384–405.

**Cases referred to**

*Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686, CA (refd)

*B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] 1 MLJ 169, PC (distd)

*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL (refd)

*Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, FC (refd)

*Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd* [2014] 4 MLJ 1; [2014] MLJU 239, FC (refd)

*K (H) (an infant), Re* [1967] 1 All ER 226, QB (refd)

*Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 ; [2012] 3 CLJ 577, FC (refd)

*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (folld)

*Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1, FC (refd)

*Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295, FC (distd)

*Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, CA (refd)

*Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1, FC (folld)

*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433, FC (refd)

*R v Gough* [1993] 2 All ER 724, HL (refd)
*R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, KB (refd)
*Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] MLJU 686, FC (folld)
*Ridge v Baldwin and others* [1963] 2 All ER 66, HL (refd)
*Schmidt v Secretary of State for Home Affairs* [1969] 2 WLR 337, CA (refd)
*Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448, FC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 25(2)
Federal Constitution arts 132(1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), 135(2), Part II
Rules of Court 2012 O 53, O 53 r 2(2)
Specific Relief Act 1950 s 44

*Athimulan a/l Muruthiah (Athimulan & Co) for the applicant.*
*Maisarah bt Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Collin Sequerah JC:**

INTRODUCTION

**[1]** Suraya bt Amdah, the applicant, is a young lady whose noble ambition was to be a nurse engaged in the employment of the Government of Malaysia. In order to achieve her ambition, she sought for and obtained a handsome scholarship to undergo a nursing diploma course for three years at the Training Institute of the Ministry of Health (MOH), Malaysia in January of 2010. However, on 23 October 2012, just months before the conclusion of her training period, an unfortunate incident befell her. That day, she received a letter from the Chairman of the Jawatan Tatakelakuan Pelatih from the Bahagian Pengurusan Latihan, Ministry of Health (MOH), which is the committee responsible for the conduct of trainees. The letter informed her that she was suspended from the course and that her scholarship payments were ceased from 19 October 2012 until a decision was made by the said committee. The reason for all of this was that she was guilty of an alleged misconduct. The alleged misconduct was that she had engaged in sexual relations with a man to whom she had no lawful ties with. A show cause letter followed on 23 October 2012. She replied with a letter of representation dated 28 October 2012. But to no avail.

**[2]** On 22 December 2013, she received a letter informing her that the Jawatan Tatakelakuan Pelatih or disciplinary committee had made a decision to terminate her from the course. To add salt to the injury, she had to pay a fine of

RM110,000. She then availed herself of the right of an appeal to the Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih or appeal committee ('the second respondent') on 8 March 2013. Alas, for on 17 April 2013, she was informed by the said body that her appeal was unsuccessful and that the decision of the earlier committee was affirmed.

**[3]** She now seeks legal redress through filing an application for judicial review for certiorari to quash the said decision of the appeal committee. She further and/or in the alternative seeks a declaration that she is still a trainee at the Kolej Kejururawatan (Nursing College) Pulau Pinang and is entitled to continue her training or course in order to attain the diploma together with all attendant benefits.

**[4]** The grounds upon which the applicant's application is premised are firstly, that of procedural unfairness or breach of natural justice and secondly, bias. Before embarking upon a consideration of the grounds advanced and their merits or otherwise, it is apposite at this juncture to briefly examine how the factual matrix of this case nestles itself within the confines of the law on judicial review. This exercise is also necessary in order to appreciate the overall context in which such an application is brought. It is no less necessary in order to ascertain the province of this court when considering cases of this nature in order to keep within the boundaries determined.

## THE LAW ON JUDICIAL REVIEW

### *The nature of administrative law and the distinction between private law and public law*

**[5]** HWR Wade in his work *Administrative Law, 1, 2* (1971) describes administrative law as being concerned with the nature of the powers of public authorities, and, especially, with the manner of their exercise. The protection of the citizen against abuse of power by the government is therefore the primary objective.

**[6]** Judicial review is a branch of administrative law that governs the relationship between the affairs of citizen's as against public authorities. In contradistinction, private law regulates the affairs of citizens as between themselves.

### *Powers of the court to grant judicial review*

**[7]** It is well recognised that judicial review is that branch of administrative law by which the High Court exercises its supervisory, as opposed to its appellate powers over the decisions of inferior tribunals and statutory bodies.

The powers vested in the High Court in this country to grant judicial review derives from the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('the CJA 1964') in particular para 1 of the Schedule to s 25(2) of the CJA 1964. This vests the High Court with power to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution.

**[8]** In an application for judicial review of a decision of an inferior tribunal or statutory body, the court may make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular actor duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them. The applicable procedure that governs applications for judicial review are contained in O 53 of the Rules of Court 2012 ('the ROC 2012'). An application for judicial review may include a prayer for a declaration (O 53 r 2(2) of the ROC 2012).

*The grounds upon which administrative action is subject to control by judicial review*

**[9]** The traditional position of the law on judicial review is that the remedy is not concerned with reviewing the merits of the decision in which the application for judicial review is made. The remedy of judicial review is primarily a review of the decision making process. In judicial review hearings the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. See *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 which held as follows:

> First and foremost, it must be emphasised that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself.

**[10]** In the celebrated case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock said as follows:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time

add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review. I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

**[11]** In our jurisdiction, the landmark decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 AMR 433 stated in no uncertain terms that the court's review is not confined to process but also substance. In the Federal Court case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] MLJU 686 it was held:

*Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our Courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the Courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*

> The Rama Chandran decision has been regarded or interpreted as giving the reviewing court a license to review without restraint decisions for substance even when the said decision is based on finding of facts. (Emphasis added.)

**[12]** A recent case which illustrates the province of a court when hearing applications for judicial review is the case of *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686 where the Court of Appeal held:

> 29 The principles governing the approach to be taken in dealing with judicial review applications have been well and authoritatively laid down in a number of cases. Basically the court in such a context was to be mindful that it was not exercising appellate jurisdiction but merely considering whether to extend its 'curial intervention' pursuant to its supervisory jurisdiction (that is, over inferior tribunals or administrative or quasi judicial decision makers).
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> *30 It has been accepted by the courts too that although as a matter of first principle judicial review was concerned primarily with the decision making process (not the merits, substance or justification), there was an exception to that rule where the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.*
>
> *In those circumstances it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision.* (Emphasis added.)

**[13]** A review of the foregoing cases suggest that the court in cases of this nature exercises supervisory and not appellate jurisdiction and merely confines itself to a review of the decision making process of the inferior body or tribunal. The exception arises in cases where these bodies in arriving at their decision have been guilty of procedural impropriety, illegality or irrationality. A fourth category, namely proportionality has been added to this. However, following the decision of the Federal Court in the case *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior*, the previous distinction between review and appeal no longer holds. Thus in assessing whether the decision making body has run foul in arriving at their decision under any of these headings, the court invariably enquires into the merits and substance of such decisions.

PROCEDURAL IMPROPRIETY

**[14]** The applicant is alleging that there was procedural impropriety on the part of the respondent's. What amounts to procedural impropriety has already been set out in the cases cited above. A matter for separate consideration would be whether the dictates of natural justice have also been transgressed. However, whether one terms it procedural impropriety or a breach of natural justice, the underlying principle here is that no one should be condemned unheard or without knowing the nature of the case against him.

**[15]** In modern and even in ancient civilisations of any note, the fundamental principle has always been that in any action which may adversely affect or impact an individual's rights, such ought to be given an opportunity to be heard and to defend themselves. The Romans encapsulated these notions into the twin concepts of 'audi alteram partem' and 'nemo judex in causa sua' which translated in English meant, the right to a fair hearing and the rule against bias, respectively. It would therefore seem that the general idea underlying this concept is that injustice is to be avoided in a situation which involves any erosion of the fundamental rights of an individual by a decision maker. Since no one ought to be condemned unheard, the concept of natural justice as of necessity therefore, would appear to translate into an almost inalienable right of an individual to demand the right to a hearing.

**[16]** But it is this very area that is not free from difficulty in modern administrative law. Sometimes a right to a hearing is specifically provided for by a constitutional provision. An example is art 135(2)of the Malaysian Federal Constitution which confers a right to certain members of service specified in para (b) to (h) of art 132(1) of being given a reasonable opportunity of being heard before any action is taken to dismiss or reduce them in rank. This presents minimal difficulty as the entitlement to a right to be heard arises out of a specific constitutional or statutory provision. More complex situations arise when a particular statute is silent on the issue. The issue that arises here is the fundamental one of whether the courts can supply the omission of the Legislature by importing the concepts of natural justice which is a creation of common law.

**[17]** The development of the law in the respect of the application of natural justice has been largely due to the progressive sentiments pronounced in *Ridge v Baldwin and others* [1963] 2 All ER 66, a decision of the House of Lords of such magnitude that it prompted a description of the case as being 'the Magna Carta of natural justice'. The decision made it clear in no uncertain terms that authority to determine a matter which affected or impacted upon the right of individuals and a duty to act judicially are not two separate requirements and that the latter is not additional to the former. See *Administrative Law of Malaysia and Singapore* by MP Jain, (4th Ed). The case established the proposition that whenever in the exercise of a power a decision is taken by the administration which affects the legal rights of an individual to his detriment, the rules of natural justice must be observed by the decision maker. The fact that the statute is silent as regards procedures to be followed is immaterial. The case also held that the requirement to adhere to the dictates of natural justice arises by implication from the nature of the power conferred. The immediate result was that now bodies exercising quasi-judicial functions were bound to adhere to the rules of natural justice even where they were primarily exercising administrative functions.

**[18]** Developments after *Ridge v Baldwin* saw the notion of what was classified as being quasi-judicial progressing to such a level of expansion to a point where effectively there ceased to exist any or any discernible distinction between what was termed 'quasi-judicial' and 'administrative'. However, the restraint still remained that the requirement to follow the dictates of natural justice would only attach to a decision maker who exercised quasi-judicial functions and not administrative functions. Judicial innovation in this area progressed to the point that the distinction between what was quasi-judicial and administrative and the fetters it placed upon the courts was discarded in favour of what was now to be regarded simply as 'fairness'. The notion of what previously was characterised as 'natural justice' now came to be regarded simply as 'fairness'. This innovation on the part of the courts led to the right to a hearing being accorded even to functions being discharged by bodies performing administrative functions. This advance in judicial thinking found favour with the courts in the case of *Re K (H) (an infant)* [1967] 1 All ER 226, which involved the nature of the duty carried out by an immigration officer in refusing admission to an immigrant. The issue which confronted the courts was whether the officer was exercising quasi-judicial functions. The House of Lords felt that the issue was not so much as to whether the officer was acting in a quasi-judicial duty or not but that of being required to act fairly.

**[19]** The advance in judicial thinking from then on has progressed to a stage which has now culminated in the emergence of the concept of what is termed as 'Legitimate Expectation' the seeds of which were planted by the decision in *Schmidt v Secretary of State for Home Affairs* [1969] 2 WLR 337. It was not unnaturally Lord Denning in that case who held that an administrative body should accord a hearing when a person's liberty, interest, or some legitimate expectation was being affected. The exact limits of this concept has yet to be defined but is now increasingly being used to claim the right to be heard in instances where some right or interest is at stake. What is clear is that the concept has come to stay in the realm of administrative law.

**[20]** That being said, it is now equally clear that there are instances where natural justice may be excluded. In cases where a particular statute is silent on the point, the courts can import natural justice into the equation. But where a statute expressly or by necessary implication excludes its application, the courts are not at liberty to lightly ignore the legislative intent. See *Administrative Law of Malaysia and Singapore* by MP Jain (4th Ed). In any event, by whatever name it is called, whether there exists procedural impropriety or a breach of the rules of natural justice, the underlying requirement in the realm of administrative law is the duty to act fairly in matters which may involve the erosion of the rights of an individual.

ALLEGATION OF PROCEDURAL IMPROPRIETY BY THE APPLICANT

**[21]** The principal ground of challenge mounted by learned counsel for the applicant is that the fate of the applicant was decided by the respondent's without according the applicant benefit of certain documentation namely, the compact disc said to contain proof of the wrongdoing (CD) and the 'college report' both of which were relied upon in coming to the decision on the applicant's fate.

**[22]** The respondent by way of reply submitted that unless and until there is an amendment to the applicable and current regulations which are the Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan Bersekutu Kementerian Kesihatan Malaysia 2010, as it stands the said regulations do not contain any provision for such documents to be served. Therefore if the applicant does not request for documents it is to be taken that he or she understands the charges preferred.

**[23]** By way of reply, learned counsel for the applicant submitted that as the applicant had denied the charges, the right to be supplied with the documents arose.

**[24]** Whether it is designated a breach of natural justice or procedural impropriety, the first ground of complaint raises the issue of whether the applicant was fairly treated by the respondent's. With regard to the right to an oral hearing, the Federal Court decision of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577 was referred to by the respondent's where it was held by Arifin Zakaria the Honourable Chief Justice of Malaysia as follows:

> In the present case, *the respondent did not at any stage request for an oral hearing or for any document to be furnished to him.* Therefore, he could not complain that such right was not afforded to him. It is for him to request for an oral hearing or for any document that he thinks could help him to prepare his answer to the charges levelled against him. In *Mat Ghaffar Baba* and *Yusof Sudin*, a request for oral hearing was made by the officers concerned, but was denied. The courts held that such refusal was unreasonable in the circumstances of the case and the courts went on to hold that the officers, in the circumstances, had not been afforded the right of hearing in its proper sense. On this ground, the decisions of the disciplinary authority were quashed. (Emphasis added.)

**[25]** The essence of the ratio of the case is that in cases of this or of a similar nature, a request ought first to be made and subsequently denied before it can be said that the decision maker had committed a breach of natural justice or is guilty of procedural impropriety. The court further distinguished the case of

*Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448 on the grounds that a request made for an oral hearing there had been denied. In the premises it was held that the appellant was deprived of procedural fairness. Although the appeal in *Tay Chai Huat* was held to be decided on that very narrow ground, it nevertheless held that the principle is that the right to an oral hearing cannot be said to have been denied if no request has been made for one. It is also noteworthy that the court by way of obiter had this to say:

> A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. This court must follow its own proclamation of law made earlier on other cases and honour the ruling. Precedents not only have persuasive authority but also must be followed when similar circumstances arise and the judges are obliged to obey the set-up precedents. This legal principle is called stare decisis. Adherence to precedent helps to maintain a system of stable laws and its use had been justified as providing predictability, stability, fairness and efficiency in the law. This court creates precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases. Utra Badi and Vickneswary are decisions that settled the law in cases of this genre with finality. *The court would have need to hesitate long before distinguishing Utra Badi and Vickneswary on inadequate grounds or on hypothetical issue raised by the appellants in appeals before this court such as whether there are exceptions to the ratio decidendi formulated in both authorities. Such hypothetical issues raised in cases of this genre can have disruptive and seemingly unfair consequences and extremely capricious results. It creates uncertainty in the law and would seriously hinder administration of the General Orders by the government departments resulting in administrative confusion.* (Emphasis added.)

**[26]** Although in *Tay Chai Huat's* case the Honourable Chief Justice opined that the appeal was allowed on that narrow ground, ie that there was no request for an inquiry of hearing, Mohd Ghazali Yusoff FCJ went much further. Mohd Ghazali Yusoff FCJ held that an oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a Committee of Inquiry pursuant to GO 26(5) of the GO (Chap D). His Lordship also said that if the disciplinary authority considers that no further clarification is required, he did not think that the officer concerned can insist or demand that a Committee of Inquiry be appointed.

**[27]** In the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525, it was held:

> The right to be heard as given by art 135(2) of the Federal Constitutiondoes not necessitate that the person concerned be given an oral hearing. Therefore, in the absence of such a hearing, one cannot conclude that it amounts to a denial of natural justice. In matters involving GO 26, the requirement of fairness is satisfied by an opportunity to make written representations to the deciding body.

**[28]** In the case of *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1, the Federal Court held (with reference to the general orders):

> *From this, it is clear that it is never the intention of the legislators to give an officer under disciplinary action the right to give oral evidence.* In any case as far as the deceased was concerned, he was given an opportunity and he did give a very lengthy letter explaining in detail why he could not have committed the acts of which he was charged under. He said in his letter that he was prepared to appear before the disciplinary authority to answer questions that the disciplinary authority may wish to pose to him. Obviously the disciplinary authority decided from the evidence available to it that it was not necessary to hear the deceased in person.
>
> *[25] From the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.* (Emphasis added.)

**[29]** This is an appropriate juncture to pause and to make it clear that the above principles with regard to the right to an oral hearing apply with equal force to the right to receive documentation.

**[30]** Learned counsel for the respondent's further submitted that the applicant here is not a public servant within the meaning of the provisions of art 132(1) and therefore the provisions of art 135(2) of the Federal Constitution do not apply to her. Now, art 135(2) provides as follows:

> No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard

**[31]** Counsel for the applicant by way of reply therefore contended that the common law rules of natural justice will apply here. This is an appropriate juncture in which to echo the salutary caution administered by the apex court in *Vickneswary's* case which held that where procedure is (as it is in this case) provided by written laws, the courts should be wary of invoking common law. This is what the court had to say in *Vikneswary*:

> Where procedure is provided by written laws, the courts should be wary of invoking common law.

**[32]** The regulations that the applicant was subject to here are designated Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan Bersekutu Kementerian Kesihatan Malaysia 2010 (Regulations). These regulations govern the conduct and behaviour of trainees and come under the purview of the Ministry of Health. A perusal of reg 22(5) of the applicable regulations make clear provision for a specific procedure to be adopted in the event of serious misconduct and it does not make any reference to the right to an oral hearing or the right to receive documentation.

**[33]** Although the applicant is not a public servant within the definition of art 135(2) of the Federal Constitution, cases decided in respect thereto afford useful guidelines to follow by way of analogy in determining the issue of whether there was procedural irregularity with regard to the case involving the applicant. Our apex court in the case of *Utra Badi* has held that the right accorded to a public servant entitled to the protection of art 135(2) does not necessitate that the person concerned be given an oral hearing and that a right to make a written representation to the deciding body satisfies the requirements of natural justice. In that case the respondent was a hospital attendant at the Penang General Hospital and was subject to the general orders. Here the applicant is undergoing a nursing diploma course under the auspices of the Ministry of Health ('the MOH') and was also the recipient of a training scholarship and is subject to rules known as Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan Bersekutu ('the regulations'). These regulations in Part VI contain the procedure applicable in the event the Training Institute of the MOH receives a report in relation to the misconduct of a trainee. Regulation 16 of the regulations provide in summary that upon receipt of a complaint of misconduct against a trainee, a preliminary inquiry will be held to determine whether the allegations are genuine. In the event it is found to be genuine, the case will be brought to the Mesyuarat Jawatankuasa Pengurusan Tatakelakuan Pelatih Peringkat IL together with the relevant documents including a show cause letter to the trainee and the evidence of the case against the trainee. Should the case against the trainee come within the jurisdiction of the Bahagian Pengurusan Latihan, the case will be presented before the Jawatankuasa Pengurusan Tatakelakuan Pelatih (Institusi Latihan) (disciplinary committee) for further action.

**[34]** The applicant, in accordance with these provisions, was served with a letter dated 23 October 2012 which informed her that an allegation of misconduct was levelled against her pursuant to reg 6(2)(C) of the regulations and article 4(1)(a) of the Scholarship Agreement. The said letter further informed her that she was given an opportunity to defend herself in writing within a period of 21 days from the receipt of a show cause letter. This is pursuant to reg 22(5). The position is analagous to the requirement of making

written representations to the deciding body under the general orders. Although the applicant here was not subject to the general orders and does not fall within the definition of a public servant under art 135(2) of the Federal Constitution, the requirements of natural justice were nonetheless satisfied by the opportunity given to her to make written representations which were expressly contained in the said regulations. As earlier alluded to, notwithstanding that the applicant does not come within the definition of 'public servant' and so cannot claim the protection under art 135(2), the case law mentioned above relating to public servants nevertheless afford analogous and useful guidelines for the courts to follow.

**[35]** Therefore, analogous to the position of public servants under the general orders, there is no right to an oral hearing unless one had made a request for such hearing. A similar position obtains with regard to the disclosure of both the CD and the college report. As there was no request made by the applicant for those materials, it cannot be said that she was denied natural justice.

**[36]** Learned counsel for the applicant placed heavy reliance on the case of *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] 1 MLJ 169 in advancing his argument to the right to receive documentation. In that case however a report (Report of the Board of Inquiry) was not made known to the applicant whereas here the nature of the report was made known to the applicant. The case of *Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa'adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295 also relied in support involved an employee in the private sector and can therefore be distinguished in that the right of recourse by the applicant here to the right to representation for dismissal and recourse to the principles regarding industrial adjudication was not open to her.

**[37]** The finding of this court therefore is that the first ground of application advanced by the applicant, namely that of a breach of natural justice and procedural unfairness in not supplying documentation has failed for the reasons enumerated above.

BIAS

**[38]** The second ground of complaint and allegation advanced by the applicant is that one Ms Ong Lee Hwa, who received the 'college report' dated 15 October 2012 in order to carry out the disciplinary investigation, also participated in the decision making body ie the Jawatankuasa Pengurusan Tatakelakuan Pelatih (Institusi Latihan) (disciplinary committee) on 29 January 2013. Later, it was alleged that she also participated in the Disciplinary Authority Appeal Board (appeal committee) which dismissed the

applicant's appeal from the Jawatankuasa Pengurusan Tatakelakuan Pelatih (Institusi Latihan) (disciplinary committee). The said Ong Lee Hwa was the secretary at both the hearing at the disciplinary committee and also the appeal committee. The applicant's second ground of challenge is therefore that of the rule against bias.

**[39]** In support of this contention, learned counsel for the applicant firstly drew the attention to the court to the Peraturan Tatakelakuan Pelatih Institusi-Institusi Latihan Sains Kesihatan of 2010 ('the regulations') which are the applicable regulations in this case. In particular, he drew attention to reg 19 under the heading Jawatankuasa Pengurusan Tatakelakuan Pelatih Di Peringkat Bahagian Pengurusan Latihan (BPL) (disciplinary committee) relating to the establishment of the said committee.

**[40]** Regulation 19 in its original form in Bahasa Malaysia under the heading 'Penubuhan' reads as follows 'KKM hendaklah menubuhkan satu Jawatankuasa Pengurusan Tatakelakuan Pelatih (disciplinary committee) (JPTP) di Peringkat Bahagian Pengurusan Latihan'.

**[41]** Regulation 20 relates to the composition of the disciplinary committee and reads after the heading 'Keanggotaan':

> Keanggotaan Jawatankuasa Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan) terdiri daripada pegawai yang di lantik berdasarkan jawatan oleh Setiausaha Bahagian BPL seperti berikut:
>
> (a) Pengerusi adalah Timbalan Setiausaha (IL) Bahagian Pengurusan Latihan;
>
> (b) Setiausaha adalah Ketua Penolong Setiausaha (Unit Pembangunan Pelatih) Bahagian Pengurusan Latihan;
>
> (c) Ahli terdiri dari sekurang-kurang Lima (5) orang Pegawai Bahagian Pengurusan Latihan yang dilantik oleh Setiausaha Bahagian Pengurusan Latihan.

**[42]** It can be seen from reg 20 that the secretary is listed as a member of the said committee.

**[43]** Regulation 21 has the heading 'Bidangkuasa' and it reads, 'Bidangkuasa Jawatan Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan) adalah bertanggungjawab menerima, meneliti, menimbang dan membuat keputusan kepada kes-kes tatatertib pelatih seperti berikut ...'. Followed by a list of instances of misconduct as follows:

(a) Pelanggaran mana-mana bahagian fasal atau syarat Perjanjian Biasiswa yang telah ditandatangani di antara pelatih dengan kerajaan;

(b) Salahlaku pelatih yang telah disabitkan di bawah mana-mana bahagian undang-undang, akta, enakmen dan peraturan Negara, kerajaan negeri dan pihak-pihak berkuasa lain termasuk Jabatan/Majlis Agama Islam;

(c) (Not relevant for purposes of this case)

(d) Pelatih yang melanggar mana-mana bahagian dalam Peraturan-Peraturan Tatakelakuan Pelatih yang melibatkan hukuman penangguhan latihan, pembatalan tawaran tempat latihan dan penamatan latihan.

**[44]** Regulation 22 outlines the procedure to be adopted by the committee and is titled 'Prosedur' and goes on to stipulate, inter alia;

(1) Pihak JPTP BPL menerima laporan pelanggaran tatakelakuan pelatih daripada ILKKM;

(2) Laporan tersebut di semak untuk memastikan dokumen yang dikemukakan mencukupi. Kes pelangaran tatakelakuan diklasifikasikan mengikut jenis kes;

**[45]** In para 4, it states as follows;

(4) Pihak urusetia JPTP, BPL akan melaksanakan proses kerja ke atas kes tatakelakuan tersebut dan menentukan jenis kes pelangaran tatakelakuan berdasarkan kepada kesalahan yang dilakukan, kronologi kes, bukti-bukti yang diperolehi serta dokumen-dokumen sokongan yang dikemukakan.

**[46]** Regulation 23 relates to the quorum of the committee and reads after the title 'Kuorum':

Kuorum adalah terdiri daripada Pengerusi, Setiausaha, dan sekurang-kurangnya tiga (3) orang daripada ahli Jawantankuasa Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan).

**[47]** In summary, what can be gathered from the above outlined provisions are firstly, the composition of the disciplinary committee that decides on disciplinary complaints includes the secretary to the committee (reg 20), secondly, the jurisdiction of the committee is to be responsible for receiving, examining, deliberating upon and making a decision on cases involving certain types of violations by trainees (reg 21), and thirdly, the procedure outlined involves the secretariat in determining the type of violation of the regulations depending on the misconduct or breach committed, preparing a chronology of the case, the evidence available and the supporting documents submitted (reg 2). Finally, the quorum of the committee comprises the secretary and others (reg 23).

**[48]** Part VII of the regulations relate to the Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih (JRPTP) di Peringkat Bahagian Pengurusan

Latihan (appeals committee). The salient provisions are set out below in its original text in Bahasa Malaysia and relate to its formation, composition, jurisdiction, procedure and quorum in that order.

BAHAGIAN VII

*Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih Bahagian Pengurusan Latihan (BPL)*

25 Penubuhan (Formation)

KKM hendaklah menubuhkan satu Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih (JRPTP) di Peringkat Bahagian Pengurusan Latihan. Mana-mana pelatih yang tidak berpuas hati dengan keputusan Jawatankuasa Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan) yang ditubuhkan di bawah Peraturan ini boleh merayu terhadap keputusan ini kepada Jawtankuasa Rayuan Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan) dalam tempoh 21 (dua puluh satu) hari dari tarikh penerimaan surat keputusan.

26 Keanggotaan (Composition)

Keanggotaan Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan) terdiri daripada pegawai yang dilantik berdasarkan jawatan seperti berikut:-

(a) ... ;

(b) Setiausaha ialah Ketua Penolong Setiausaha (Unit Latihan Pra Perkhidmatan) Bahagian Pengurusan Latihan;

(c) ...

27 Bidangkuasa (Jurisdiction)

Bidangkuasa Jawatankuasa ini adalah untuk menerima, meneliti, menimbang dan membuat keputusan ke atas kes-kes rayuan hukuman pelanggaran tatakelakuan pelatih yang telah diputuskan oleh Jawatankuasa Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan). Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih berhak:

(a) meminda/meringankan hukuman;

(b) mengurangkan denda dan menentukan cara bayaran denda;

(c) membebaskan dari hukuman pelanggaran tatakelakuan pelatih; dan

(d) menolak rayuan, mengesah dan mengekalkan keputusan hukuman.

28 Prosedur (Procedure)

(a) ... ;

(b) ... ;

(c) Apabila menerima rayuan itu di bawah subperaturan (b) JRPTP hendaklah menyebakan suatu salinan rekod prosiding JPTP

disediakan, termasuklah alasan yang JPTP bergantung kepadanya dalam mencapai keputusannya;

(d) ... ;

(e) Mesyuarat JRPTP akan bersidang dan memutuskan pertimbangan ke atas rayuan perayu tersebut;

(f) Urusetia JRPTP, BPL akan mengemukakan surat keputusan Mesyuarat JRPTP kepada pelatih dan penjamin-penjamin melalui pihak ILKKM.

29 Kuorum (Quorum)

Kuorum adalah terdiri daripada Pengerusi, Setiausaha dan sekurang-kurangnya (3) tiga orang daripada ahli Jawatankuasa Rayuan Pengurusan Tatakelakuan Pelatih (Bahagian Pengurusan Latihan).

**[49]** It can be observed from the above that the secretary makes up the composition of the appeal committee. Regulation 27 empowers the appeal committee to receive, examine, deliberate and make decisions on appeals in respect of decisions made by the disciplinary committee. Under the procedure outlined in reg 28(f), the secretariat is to submit a letter conveying any decision made to the trainee and their guarantors. Regulation 29 states that the secretary is part of the quorum of the appeals committee.

**[50]** Against this backdrop, learned counsel for the applicant then referred to two exhibits in encl 21 which are extracts of the minutes of the disciplinary committee dated 29 January 2013 and the appeal committee dated 16 April 2013 respectively. The said extract of the minutes of the disciplinary committee reflects that the said Ong Lee Hwa is listed as attending in her capacity as secretary while the extract of the minutes of the appeal committee reflects that she attended as a member. Counsel for the applicant therefore contends that the involvement of the said Ong Lee Hwa gave rise to bias against the applicant.

**[51]** The learned senior federal counsel ('the SFC') for the respondent's on the other hand, submitted that the allegation of bias made by the applicant is baseless because Ong Lee Hwa was only a member of the secretariat of the JPTP ('the BPL') and that she does not form any part of the quorum under reg 23. She further submitted that a closer inspection of the minutes of the 29 January 2013 will reveal that Ong Lee Hwa acted in the capacity as secretary to the secretariat and was not part of the quorum of the said meeting under reg 23.

**[52]** The learned SFC further submitted that reg 23 must be read together with reg 20(b) which provides that the secretary must be a 'Ketua Penolong Setiausaha (Unit Pembangunan Pelatih) Bahagian Pengurusan Latihan'.

**[53]** It was further contended by the learned SFC that as Ong Lee Hwa is the secretary to the secretariat of the BPL, she cannot be considered as a member of the JPTP or disciplinary committee as the duties of the secretariat of the BPL is limited to those enumerated in reg 22(4) of the regulations which are administrative in nature.

**[54]** Reducing the respective parties contentions to a bare minimum, the issue to be determined is whether the presence of the said Ong Lee Hwa at the meeting of the disciplinary committee on the 29 January 2013 and at the meeting of the appeal committee on the 16 April 2013 subsequently was to merely perform secretarial duties or to participate in a decision making capacity?

**[55]** The indisputable facts that emerge from the minutes and the regulations when read together are these. Firstly, the minutes of the disciplinary committee meeting lists Ong Lee Hwa as secretary under the heading 'Secretariat'. On the last page she signs off on the minutes as being reviewed by her, ie 'Disemak oleh'. Cross referring to the regulations, it is observed that reg 20(b) lists the office of secretary as being a member of the committee and also comprising the quorum (reg 23). However, reg 22(4) relating to procedure specifically states that the secretariat's function is to classify the type of violation of the regulations depending on the misconduct or breach committed, prepare a chronology of the case, collate the evidence available and the supporting documents submitted. This would indicate that the role of Ong Lee Hwa in the committee would seem to be limited to a mere secretarial one. The duties imposed upon the secretariat by reg 22(4) would appear to be merely administrative in nature.

**[56]** Although reg 20 includes the secretary as forming part of the constitution of the committee, a perusal of the minutes of the committee places her as being under secretariat *(urusetia)*. The fact that she signed of the minutes after having reviewed the same would also indicate that her role was limited to that of a secretarial nature.

**[57]** The minutes of the appeal committee lists the said Ong Lee Hwa as 'KPSU (Pembagunan dan Hal Ehwal Pelatih)' and as a member 'Ahli'. Regulation 26 includes the secretary as comprising a member of the Appeal's Committee. The specific wording is 'Setiausaha ialah Ketua Penolong Setiausaha (Unit Latihan Pra Perkhidmatan) Bahagian Pengurusan Latihan'. Interestingly enough, this is the designation held by En Muhammad Adli bin

Mahmood as is reflected in the minutes where his name is listed as being absent on the date the appeal committee met on the 16 April 2013. This lends support to the submission advanced by the learned senior federal counsel that Ong Lee Hwa had merely deputised for the said En Muhammad Adli bin Mahmood who was unable to be present.

**[58]** Regulation 27 (set out earlier verbatim in Bahasa Malaysia) outlines the jurisdiction of the appeal's committee which is, inter alia, to receive, examine, deliberate and make a decision in respect of appeals made against decisions by the committee. In respect of procedure, reg 28(f) stipulates that the secretariat will issue a letter conveying the decision of the appeals committee to the trainee and to the sureties concerned through the ILKKM. This would indicate that the duties of the secretariat is no more than administrative. Regulation 29 includes the secretary as comprising the quorum of the appeals committee.

**[59]** The composition of the disciplinary committee and the appeals committee is one that is determined by the regulations and while the secretary is listed as comprising part of these committees, what sets it apart from the rest of the members are the specific roles that are assigned to it by the regulations which are secretarial and administrative in nature. These have been already alluded to above. The presence of the said Ong Lee Hwa was also one that was determined by the regulations and her presence there was necessary in order to constitute the quorum of the said committees (see reg 23 of the disciplinary committee and reg 29 of the appeals committee respectively). The principle of necessity excludes bias and an adjudicator who may otherwise be disqualified from adjudicating on a dispute because of bias, may still have to adjudicate on the matter because there may be no one else left competent to decide the matter, or if a quorum cannot be formed without him or her. The exception is based on practical necessity. See *Administrative Law of Malaysia And Singapore*, (4th Ed) by MP Jain.

**[60]** It is perhaps apposite at this juncture to briefly examine the prevailing test in respect of the issue of bias. The law in respect of bias is encapsulated in the Latin maxim 'nemo judex in re sua' which means that persons should not be judges in their own cause. The decision making body must therefore be impartial and objective in coming to their decision. A related concept is the time-honoured and oft-quoted phrase that emanates from the illuminating observation made by Lord Justice Hewart in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at p 259 as follows:

> Justice 'should not only be done, but should manifestly and undoubtedly be seen to be done

**[61]** The test in respect of bias as laid down in the case of *R v Gough* [1993] 2 All ER 724 is the 'real danger of bias' test. The test was formulated in the

following terms:

> Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour the case of the party to the issue under consideration by him.

**[62]** The test excludes from its realm mere surmise or conjecture as did the previous test of 'real likelihood of bias'. In the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1, the Federal Court endorsed the test of 'the real danger of bias' and said this:

> Having given careful consideration to the matter, we prefer the test of apparent bias given in Gough ('the real danger of bias' test) as this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.

**[63]** The test of 'real danger of bias' was recently applied by our apex court in the case of *Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd* [2014] 4 MLJ 1; [2014] MLJU 239. The test of 'real danger of bias' as enunciated in *R v Gough* was also accepted as the prevailing test in our jurisdiction in the earlier Federal Court case of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293.

**[64]** Taking all of the above into consideration and reading the aforesaid minutes in tandem with the regulations, I find myself driven to the conclusion that the role performed by the said Ong Lee Hwa was secretarial and administrative in nature. There was also no evidence advanced that the said Ong Lee Hwa had brought to bear any undue influence in the decision made by the appeals committee given her limited role. That being the case, this court finds that there was no real danger of bias by reason of Ong Lee Hwa's presence at the meeting of the disciplinary committee and also the appeals committee. Mere supposition or conjecture in this regard is insufficient to make out a case of bias as evident from the foregoing principles. I therefore find no merit in the allegation of bias raised by the applicant.

**[65]** With regard to the allegation by the applicant that the said Ong Lee Hwa had made calls to the parents of the applicant to meet up in Putrajaya in order to 'discuss certain matters', there were no averments made to show whether or not such a meeting did in fact take place and if so, what were the matters discussed to the prejudice of the applicant. The court therefore found no substance in this complaint.

**[66]** In the premises, this court therefore dismissed the application filed by the applicant with costs.

*Application dismissed with costs.*

Reported by Afiq Mohamad